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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

NO. ___ _____

STATE OF NEW JERSEY,

Respondent,

v.

JAMES H. HALL, JR.,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW JERSEY

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I

QUESTIONS PRESENTED

1. Whether the courts of the State of New Jersey have jurisdiction under the Fourth Amendment of the United States Constitution to create a procedure whereby a citizen can be compelled to submit to a lineup on less than probable cause.

2. Whether, under the Fourth Amendment of the United States Constitution, the Courts of the State of New Jersey can employ a procedure whereby a citizen can be compelled to submit to a lineup on less than probable cause, be in fact deprived of his liberty without arrest or indictment, and without rights to bail or Miranda warnings.

3. Whether a procedure may be employed whereby a citizen is detained, seized, and compelled to submit to a lineup on the bare allegations of a police officer, on less than probable cause, without an opportunity prior to the detention to confront his accusors to show mistake, suggestion, or lack of credibility.

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PETITION FOR A WRIT OF CERTIORARI
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JAMES H. HALL, JR. petitions for a Writ of Certiorari to review the judgment of Supreme Court of New Jersey in this case.

OPINION BELOW

The opinion of the Supreme Court of New Jersey (App. A, infra, 1a-38a) is reported at 93 N.J. 552 (1983).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3). The opinion below was issued on July 14, 1983.

STATEMENT

In the early morning hours of February 3, 1983, an armed robbery was alleged to have taken place in the home of James Bailey and Louis Campanelli in Cliffwood Beach, New Jersey. Bailey and his girlfriend, Stacy Dillon, eventually related the following series of events to the police: They had just arrived at the home when two male intruders appeared, one white and one black. The white male demanded that Bailey produce ten pounds of marijuana that he believed was in the house. Bailey explained that he did not have the marijuana but that Michael Huff, from whom he had purchased nine ounces of marijuana, did have it. Bailey then turned over the nine ounces of marijuana. The two intruders then began an extensive

search of the home. One of them took Bailey's wallet. The black man took Dillon to a front room and tied her hands. Later she was taken into the bedroom and tied to Bailey. As the two intruders were leaving, one of them told Bailey that they would return Bailey's television and stereo when they received money owed to them by Michael Huff. Five minutes later, Dillon and Bailey freed themselves and phoned Bailey's roommate, Louis Campanelli.

After learning of the robbery, Campanelli, Huff and two other friends arrived at the house. Later, the police were called. When the police arrived, the two victims described the robbery, but omitted to mention the drugs.

Ten days after the robbery, Detective Joseph Booket of the Aberdeen Town-

ship Police Department called Bailey and Dillon and requested that they come to the police department to assist in the preparation of composite sketches of the two perpetrators. (3T129-1 to 130-1, 3T198-9; 3T263-5 to 12.)[1/]

On April 3, 1978, Louis Campanelli was interviewed by Detective Kenneth Wicklund of the Aberdeen Township Police Department. Detective Wicklund's report, dated April 3, 1978, made in connection with that interview, stated, "This Hall hold up was over a drug rip off." Wicklund admitted that Mr. Hall was not

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1/ 2T refers to the transcript of the motion to compel defendant's participation in a lineup; 3T refers to Volumes I and II of the trial transcript. 6T refers to the post-trial proceedings of January 28, 1980. Da refers to the appendix of the defendant's brief before the Superior Court of New Jersey, Appellate Division.

a suspect at that time and that his name was never even mentioned, but stated that the "Hall" hold up was intended to be the "whole" holdup. (3T508-1 to 10; 3T14-19 to 25).

In or about early April, 1978, Michael Huff was interviewed by Detective Booket. Huff advised Booket that the robbery was related to a drug transaction. At the interview, Huff viewed the composite and stated that the white male resembled John Beqnis who had left for the State of Mississippi in a U-Haul on February 3, 1978, shortly after the robbery. The police did nothing further to trace Bennis. (3T286-22 to 288-10). Although the police had in their possession a photograph of John Bennis (3T312), it was not shown to Bailey or Dillon (3T288).

After interviewing Michael Huff on

April 7, 1978, Detective Booket called Bailey and Dillon back to the police department. Bailey and Dillon then admitted to the drug transaction. (3T290-22 to 3T291-9). Neither Bailey, Dillon nor any of their cohorts were arrested, indicted or otherwise punished under the laws of New Jersey for their admitted crimes.

On April 12, 1978, Louis Campanelli, Bailey's roommate, told Detective Booket about his involvement in a transaction involving ten pounds of marijuana. Campanelli advised Booket that he had informed one Dennis Miseje of the pending transaction on January 24, 1978. (Da4-1 to 10).

In May of 1978, Detective Booket was advised by a Detective from the Carteret Police Department that an informant

had seen James Hall in the company of Dennis Miseje, and that the informant, after observing a composite of the perpetrators, identified one of the persons depicted as James Hall. (Da-4-16 to 21).

On June 6, 1978, four months after the incident, Detective Booket requested that Bailey and Dillon come to the police headquarters to view a photo array containing Mr. Hall's photograph. Dillon identified a photograph of Michael Gonshark as "looking like" the perpetrator. (3T56-15 to 58-10). Bailey stated that the photograph of Mr. Hall resembled the perpetrator, but that he was not positive. (Da5).

The Monmouth County Prosecutor then moved for an order compelling Mr. Hall to appear in a lineup. In support of the motion, the Prosecutor relied entirely on

the affidavit of Detective Booket. The affidavit related, in pertinent part: (1) that an alleged unidentified informant, who had not otherwise been shown to be reliable, had identified the composite as depicting James Hall; (2) on viewing the photo lineup containing Mr. Hall's photograph, Stacy Dillon could not identify the "perpetrator"; and (3) on the viewing the photo lineup, James Bailey stated that Mr. Hall's photograph resembled the white male perpetrator, but that he was not positive, stating that the hair and facial hair length in the photograph was different from that of the perpetrator. (Dal to 5).

On November 3, 1978, Judge Merritt Lane, Jr., of the New Jersey Superior Court, granted the State's motion based exclusively on the affidavit of Detective

Booket. (2T).

On January 23, 1979, at the court-ordered lineup, Bailey and Dillon identified Mr. Hall.

The police then swore out a criminal complaint against Mr. Hall. Mr. Hall was charged with a five count indictment: Count I, Entering without breaking; Count II, Robbery of goods valued at excess of $500.00; Count III, Armed Robbery; Count IV, Assault with a dangerous weapon; and Count V, Possession of a dangerous weapon.

On November 5, 1979, Mr. Hall was found guilty by a jury on Counts I, II, III and V and found not guilty on Count IV.

On November 14, 1979, the defense moved for a new trial. In support of the motion, the defense argued, inter alia, that Mr. Hall was deprived of his consti-

tutional rights in being forced by order of the New Jersey Superior Court to appear in a pre-arrest lineup. (Da20 to 21).

On January 28, 1980, the trial judge denied the motion for a new trial. (Da42). Mr. Hall was sentenced to State Prison for a term of three to four years on Count I, five to six years on Count II, one to two years on Count III, all sentences to run concurrently. Count V was merged for sentencing purposes with Count III.

A Notice of Appeal to the Appellate Division of the Superior Court of New Jersey was filed by the defense on January 3, 1980. Mr. Hall's brief charged, inter alia, that the pre-indictment lineup violated constitutional rights and cited State v. Schweitzer, 171 N.J. Super. 82 (Law Div. 1979), in support of that con-

tention.

State v. Schweitzer, supra, a case decided shortly after Mr. Hall's trial, held that the subject matter jurisdiction of the Superior Court in criminal cases is first established on the filing of complaint on probable cause or indictment. Finding that there exists no grant of pre-arrest jurisdiction, the court concluded that there was neither jurisdiction over subject matter or the person to issue a pre-arrest detention order. Thus, to seek a suspect to appear in a lineup constituted a "deprivation of liberty offensive to due process". 171 N.J. Super. 89-90.

On March 1, 1982, the Appellate Division of the New Jersey Superior Court affirmed the conviction and specifically overruled Schweitzer. State v. Hall, 183

N.J. Super 221 (App. Div. 1981). In that opinion, the court stated, "We are satisfied the judicial branch has jurisdiction in criminal matters extending beyond the limits of Schweitzer" and based its finding of jurisdiction on the New Jersey Constitution (1947), Article VI, Section 3, paragraphs 2 and 3. 183 N.J. Super 229-230. Noting that Fourth Amendment considerations "come into play", the court relied on Davis v. Mississippi, 394 U.S. 721 (1969), to find that such a detention for lineup purposes "may constitute a much lesser intrusion upon personal security than other types of police searches and detentions." 394 U.S. at 727.

The defense filed a Petition of Certification to the Supreme Court of New Jersey, complaining that, inter alia, the Appellate Division erred in extending jur-

isdiction to issue detention warrants of less than probable cause, that its standards specifically violated the Fourth Amendment, and that the procedure employed did not comport with due process. Petition for Certification was granted on May 4, 1982, 91 N.J. 195 (1982).

On July 14, 1983, the New Jersey Supreme Court affirmed the decision of the New Jersey Superior Court, Appellate Division. 93 N.J. 522 (1983). The New Jersey Supreme Court held that "the Superior Court has jurisdiction to issue a warrant compelling a suspect to appear in a lineup prior to the filing of criminal charges upon a showing of less than probable cause provided that certain evidential standards and protective measures are satisfied". The court concluded that pre-arrest jurisdiction is founded on the con-

stitutional powers of the judiciary over searches and seizures rather than, as the Appellate Division had found, on the inherent powers bestowed on the courts by the state constitution. The court referenced this jurisdictional basis to the Fourth Amendment of the United States Constitution, and Article I, Paragraph 7 of the New Jersey Constitution (1947), which is practically identical. Concluding that an evidential finding of probable cause is not prerequisite to a detention warrant, and that such a warrant, as part of a class of identification procedures comparable to fingerprinting, is sustainable on less than probable cause, the court proceeded to outline evidential standards and procedural criteria. Based solely on the standards set forth in its opinion, the matter was then referred to

Criminal Practice Committee of the New Jersey Supreme Court, a rule making committee, for the purposes of general study, and for recommendation of appropriate rules and guidelines to govern these detentions.

REASONS FOR GRANTING THE PETITION

1. In holding that the court has jurisdiction to issue a criminal detention warrant to compel an individual to appear in a lineup when the standard of probable cause has not been met, the New Jersey court has brought judicial involvement to an area historically delegated to the executive branch of government. Traditionally, it has been the function of the police to investigate criminal matters and the courts to determine whether the investigation has matured to the point

where an arrest or search is appropriate. Judicial intervention would commence where there were allegations to support probable cause to search or arrest. By virtue of an expanded pre-probable cause jurisdiction, the court is lending its authority to the early stages of an investigation, and thus functioning as investigatory police. The danger thus arises that the judiciary would lose its detachment and its capacity to act as an impartial forum for the protection of constitutional rights. See Schweitzer, supra, at 90, and Wise v. Murphy, 275 A.2d 205 (D.C. App. 1971) at 221.

The New Jersey court makes no requirement that a prior hearing be held.[2/]

2/ Although the Davis Court notes that there should be judicial authorization prior to a prearrest detention for fingerprinting, the scope

The detention warrant may be procured on an ex parte application and based entirely on the hearsay affidavit of a police officer. As no prior hearing is afforded although judicial authorization is involved, the practical effect of the detention is simultaneously to broaden police power and to minimize the significance of judicial review as affording protection to citizens' basic consitutional rights.

The New Jersey court rationalizes its jurisdiction by analogizing a detention warrant to a search warrant, reasoning that, as with a search warrant, its jurisdiction over a pre-arrest lineup is conferred by the Fourth Amendment to the United States Constitution and its

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of the judicial review is never expounded. (394 U.S. at 727).

New Jersey equivalent. Paradoxically, the New Jersey court fails to complete the analogy it suggests, creating a detention procedure and according itself jurisdiction on less than probable cause. The court explains that this pre-probable cause jurisdiction would permit a "salutary review of police action" while affording constitutional protections to individuals. However, the review can hardly be deemed salutary as it deprives a citizen of his liberty on less than probable cause, without a hearing, without an indictment or accusation, without the right to bail or counsel, and without Miranda rights. Rather than adding constitutional protections, the pre-arrest jurisdiction eviscerates the Fourth Amendment, expanding the police power and rendering the Warrant Clause completely

meaningless.

2. The New Jersey court reasons that a finding of probable cause is not prerequisite to a pre-arrest lineup detention by virtue of Davis v. Mississippi, supra. The Davis Court observed that "...because of the unique nature of the fingerprinting process, such detentions might, under narrowly defined circumstances, be found to comply with the Fourth Amendment even though there is no probable cause in the traditional sense." 394 U.S. at 727. However, the Davis Court distinguished a lineup detention from a detention for fingerprinting. The Court noted the scientific value of fingerprinting, a process "inherently more reliable and effective than eyewitness identifications." which, unlike a lineup, is employed outside of a criminal investigation

as well, and may not be employed repeatedly or for the purposes of harrassment. 394 U.S. at 726-727.

The New Jersey court refers to United States v. Wade, 388 U.S. 218 (1967), to support the value of a lineup as a protection against abuses and unfairness. Wade, however, addressed the right to counsel at a lineup held after an arrest based on probable cause, unlike Hall, which deals with a pre-arrest, pre-indictment and pre-bail detention. The court below also fails to appreciate the abhorrence for lineups expressed in Wade:

> "...(t)he confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial.
>
> .... Moreover, '(i)t is a matter of common experience that,

> once a witness has picked out the accused at a lineup, he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then, before the trial." 388 U.S. at 228-229.

In formulating its decision, New Jersey court distorted the holdings of Terry v. Ohio, 392 U.S. 1 (1968), and its progeny. Terry held that where a police officer observes unusual conduct which leads him to reasonably conclude that criminal activity may be afoot, and that the persons may be armed and presently dangerous, and where on making inquiry, nothing serves to dispel his reasonable fear for his own or others' safety, he may conduct a limited pat down search for weapons. The Terry Court expressly declined to address "the constitutional pro-

priety of an investigative 'seizure' upon less than probable cause for purposes of 'detention' and/or interrogation." 392 U.S. at 19, n.16. However, in Dunaway v. New York, 442 U.S. 220 (1979), the Court emphatically rejected any standard short of probable cause for an involuntary custodial interrogation. 442 U.S. at 216.

In United States v. Brignoni-Ponce, 422 U.S. 873 (1975), border stops on the basis of "reasonable suspicion" were permitted because of the special interest of the federal government in immigration control. By contrast, the governmental interest in the case at bar is the generalized police interest of the State, while the intrusion is an extended seizure rather than a mere stop.

In Michigan v. Summers, 452 U.S. 692 (1981), the Court authorized a limited

detention of occupants while a search of the premises was conducted pursuant to a valid search warrant issued on the basis of traditional probable cause. The Court reasoned that where evidence is sufficient to establish probable cause to search, it is constitutionally reasonable to require that individuals remain while officers execute the search. 452 U.S. at 704-705. The case at bar is distinguished from Summers by the lack of probable cause. Furthermore, the stated purposes of the Summers detention were to prevent flight, minimize harm, and facilitate the orderly completion of the search. 452 U.S. at 702-703. Those interests are not present in Hall. In fact, a pre arrest detention warrant may serve to encourage flight. If an individual served with an order to appear in a lineup should flee, he cannot be

extradited from another jurisdiction because probable cause is absent.

The holding below is inconsistent with United States v. Place, 52 U.S.L.W. 4844 (U.S. June 21, 1983). In Place, the Court held that an extended (ninety minute) detention of luggage to a narcotics detecting dog was unreasonable. The Court stated that the limitations applicable to Terry precluded the detention. 52 U.S.L.W. at 2847. As the intrusion in Hall is far greater, involving the detention and extended seizure of a citizen, the rationale of Place would likewise preclude it.

3. The "evidential standards" offered by the New Jersey court fail to satisfy Fourth Amendment requirements. The first standard, that the police must show "that the crime has occurred, is unsolved, and is under investigation" mere-

restates that the lineup is being conducted as part of the investigation of a crime. This standard falls short of the special reasons which were required to substantiate even the mre stops of United States v. Brignoni-Ponce, supra, (governmental interest in border searches) and Terry v. Ohio, supra, (reasonable suspicion that criminal activity is afoot).

Secondly, that the police must demonstrate a "reasonable and well-grounded basis to believe that the individual sought may have committed the crime" is invalid on Fourth Amendment grounds and unconstitutionally vague on Fourteenth Amendment due process grounds. In Illinois v. Lance Gates, 51 U.S.L.W. 4709 (U.S. June 8, 1983), the Court notes: "... it is clear that only the probability, and not a prima facie showing of

criminal activity is the standard of probable cause." 51 U.S.L.W. at 4715, quoting Spinelli v. United States, 393 U.S. 410 (1969) at 419. However, the standard that the New Jersey Court suggests, as applied, deals not with probabilities, but with mere speculation. The warrant in the case at bar was issued although neither subject identified Mr. Hall's photograph. The suggested standard obviously permits the police to detain numbers of citizens while allegedly seeking a single perpetrator. As rights to a hearing, Miranda warnings, and bail are denied, this procedure effectively strips a citizen of his own constitutional rights on the barest of allegations.

The third evidential standard posited by the New Jersey court requires a showing that the "results of the detention

will significantly advance the investigation and serve to determine whether or not the suspect probably committed the crime." However, because of the suggestibility of a lineup, as well as the risk of mistaken identification, the results may improperly advance the investigation. In Davis and Wade, the Court warns that a lineup is an unreliable, unscientific procedure. Repeated viewing of an individual or his photograph may suggest his identity. See People v. Brown, 459 N.Y.S.2d 227 (Co. Ct. 1983). As the officer conducting the lineup is generally convinced that the individual is in fact the perpetrator, there is added suggestion.[3/] Therefore, to com-

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3/ The suggestibility of the procedure can be no better demonstrated than by the case at bar. Mr. Hall's face was the only one common to both lineups. The bias of the police is clear from their failure to pursue the stronger lead, from the false information in Detective Booket's affidavit, and from the suspicious mention of the "Hall holdup" in an early police report.

pel an individual to appear in a lineup based on mere speculation, with no prior hearing or Miranda warnings, defies the Fourth, Fifth, and Fourteenth Amendments.

The fourth evidential standard suggested by the court below is "that the results cannot otherwise practicably be obtained." The New Jersey court thus requires a showing that, as to the individual involved, the investigation would, as a practical matter, be terminated unless the procedure were employed. The court below noted that the procedure employed at the matter at bar comported with its standards, i.e., the investigation, as to Mr. Hall, would have terminated had this procedure not been employed. It therefore follows that unless the procedure is justified, the conviction would not stand. This is also implicit from the

fact that Certification to the New Jersey Supreme Court was granted on the issue of the validity of the pre arrest lineup procedure alone. Therefore, if the procedure is unjustifiable, nothing can purge the initial taint. As the fruits of improper procedures are excluded because of constitutional improprieties, this practically per se procedure, involving constitutional improprieties, cannot be justified, and its fruits are necessarily tainted.

CONCLUSION

In its opinion below, the Supreme Court of New Jersey introduces a practically per se procedure whereby a citizen can be compelled to submit to a lineup prior to arrest, indictment, accusation, or the filing of a criminal complaint against him. The procedure is sustainable on "less than probable cause," which, as applied, requires little more than the barest speculation. The citizen is afforded no Miranda warnings, and no rights to bail. Prior to the detention, the citizen is afforded no hearing in which he may confront or crossexamine his accusor, so that, as a practical matter, there is no way of determining whether any evidential standard has been met. Clearly, the procedure does not meet constitutional requirements, and a conviction based thereon cannot stand.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF NEW JERSEY
A-48 September Term 1982

STATE OF NEW JERSEY :

Plaintiff-Respondent, :

v.

JAMES H. HALL, JR. :

Defendant-Appellant. :

Argued Decmeber 7, 1982 -- Decided July 14, 1983.

On certification to the Superior Court, Appellate Division, whose opinion is reported at 183 N.J. Super. 224 (1982).

Stuart Surick argued the cause for appellant.

Debra L. Stone, Deputy Attorney General, argued the cause for respondent (Irwin I. Kimmelman, Attorney General of New Jersey, attorney).

The opinion of the Court was delivered by HANDLER, J.

The issue presented by this appeal is whether the Superior Court had jurisdiction and adequate grounds to compel the defendant to submit to a lineup prior to his arrest or the filing of any charges against him. We now hold that the Superior Court has jurisdiction to issue process compelling a suspect to submit to a lineup prior to the filing of criminal charges upon a showing of less than probable cause, provided certain evidential standards and protective procedures are satisfied.

I

In the early morning hours of February 3, 1978 an armed robbery took place

at the home of James Bailey, in Cliffwood Beach, New Jersey. Bailey and his girlfriend, Stacey Dillon, had just arrived at the home when two male intruders appeared, one white and the other black. The white male demanded that Bailey produce ten pounds of marijuana that he believed was in the house. Bailey explained that he did not have the marijuana, but that Michael Huff, from whom he had purchased nine ounces of marijuana, had the contraband.

After Bailey turned over the nine ounces of marijuana that he did possess, the intruders began an extensive search of the home. They cut wires from several stereo components, ripped a television from its casings and tore a telephone from the wall. At this time one of the intruders also took Bailey's wallet. The black man

then took Dillon into a front room and tied her hands. Later she was taken into the bedroom and tied to Bailey. As the intruders were leaving, one of the men told Bailey that they would return Bailey's television and stereo when they received money owed to them by Michael Huff.

Dillon and Bailey freed themselves and telephone the latter's roommate, Louis Campanelli. They did not immediately call the police because the incident involved drugs. After learning of the robbery, Campanelli, Huff and two other friends arrived at the house. The police were then called. When the police arrived, the two victims gave complete descriptions of the intruders.

Subsequent police investigation of the episode revealed that the defendant, James H. Hall, Jr., might have been one of

the intruders. A week after the robbery Detective Joseph Booket of the Aberdeen Township Police Department called the victims and requested that they come to police headquarters to assist in the preparation of a composite sketch of the two perpetrators. Dillon, who had been able to observe the white intruder from a distance of five feet during the robbery, was unable to identify defendant from a series of photographs of potential suspects. Bailey made an equivocal identification of defendant's photo, noting that he could not be absolutely sure because the man's hair in the photo was a "lot shorter" than it was on the night in question. Based upon this tentative identification, the Monmouth County prosecutor moved for an order compelling defendant to appear in a lineup. Over de-

fendant's objections and following a hearing, the trial court granted the motion and scheduled a lineup.[1]

After viewing the court-ordered lineup, Dillon twice identified defendant as one of the men who robbed her. Bailey also viewed the lineup and positively identified defendant. Immediately after the lineup the police swore out a criminal complaint against Hall. Defendant was charged in a five-count indictment with entering with intent to steal, robbery of goods valued in excess of $500, armed robbery, assault with an

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[1] Prior to the lineup, a man entered Bailey's place of employment looking for Bailey. A co-worker advised Bailey that the man had asked for him on a previous occasion. Bailey followed the man outside and saw him walk to a car in which defendant was sitting. Defendant excited the car and exclaimed "Jimmy (Bailey), I never saw you before in my life. I didn't do it. Do you know how many guys look like me...?" Bailey responded by shaking his head.

offensive weapon, and possession of a dangerous weapon.

Defendant was found guilty by a jury on all counts with the exception of assault with a deadly weapon. Thereafter defendant moved unsuccessfully for a new trial, arguing that the court-ordered lineup was improper and that the jury verdict was tainted. The Appellate Division affirmed the convictions. 183 N.J. Super. 224 (1982). The Court granted the petition for certification limited to the issue of the validity of the order compelling the lineup. 91 N.J. 195 (1982).

II

Defendant challenges the jurisdiction of the trial court to issue an order compelling an unarrested and uncharged suspect to appear for a lineup.

He relies upon State v. Schweitzer, 171 N.J. Super. 82 (Law Div. 1979), which held that the Superior Court lacked jurisdiction to subject an individual to a pre-charge or pre-arrest detention. In its decision below the Appellate Division expressly overruled Schweitzer, finding untenable its "parochial view that both subject matter and personal jurisdiction in the judicial branch are marked at their extremities by the indictment and the imposition of sentence." 183 N.J. Super. at 228. The Appellate Division ruled that under N.J. Const. (1947), Art. VI, § III, pars. 2 and 3[2] the Superior Court possessed jurisdiction over criminal matters

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[2] Art. VI, § III, par. 2 provides: "The Superior Court shall have original general jurisdiction throughout the State in all causes."

Art. VI, § III, par. 3 provides in perti-

including ordering ordering a suspect to appear for a lineup. Id. at 229.

We concur with the Appellate Division's conclusion that the State and federal constitutions authorize the judiciary to order a lineup in these circumstances. We determine, however, that the jurisdiction of a court to issue process authorizing a pre-charge or pre-arrest detention in conjunction with a criminal investigation is founded on the judiciary's constitutional powers over searches and seizures. N.J. Const. (1947), Art. I, par. 7 and U.S. Const., Amend. IV.[3]

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[2] (cont'd)

nent part: "Each division (of the Superior Court) shall . . . hear such causes, as may be provided by rules of the Supreme Court."

[3] The language of these State and federal constitutional provisions is nearly identical. N.J. Const. (1947), Art. I, par. 7 provides:

We believe that an application to detain a suspect for the purpose of conducting a lineup must be considered as "the functional equivalent of an application for( ) issuance . . . of a search warrant." In re Fingerprinting of M.B., 125 N.J. Super. 115, 122 (App. Div. 1973) (application for an order compelling fin-

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[3] (cont'd)

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or addirmation, and particularly describing the place to be searched and the papers and things to be seized.

U.S. Const., Amend. IV reads:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

gerprinting of an entire class of public school students during a criminal investigation); see also In re Morgenthau, 188 N.J. Super. 303 (App. Div. 1983); State v. Foy, 146 N.J. Super. 378 (Law Div. 1976), app. dism. 153 N.J. Super. 503 (App. Div. 1977); Matter of Abe A., 56 N.Y. 2d 288, 437 N.E. 2d 265, 452 N.Y.S. 2d 6 (N.Y. 1982) (judicial authority to compel investigatory detention rests on court's power to issue search warrants); People v. Marshall, 244 N.W. 2d 451 (Mich. Ct. App. 1976) (same); cf., Wise v. Murphy, 275 A. 2d 205 (D.C. 1971) (court's power to issue investigatory process rests on statutory authority); State v. Grijalva, 533 P. 2d 533 (Ariz. 1975), cert. den. sub nom. Grijalva v. Arizona, 423 U.S. 873, 96 S.Ct. 141, 46 L.Ed. 2d 104 (1975) (court's jurisdiction over pre-arrest detentions based

on statutory authority). An individual who must submit to a lineup is detained by the police and visually examined by crime victims or witnesses. Because such a detention, like a search, invades an individual's privacy and, like any seizure or arrest, restrains personal liberty, the constitutional interests upon which investigatory detentions and conventional searches and seizures may intrude are similar. Davis v. Mississippi, 394 U.S. 721, 726-27, 89 S.Ct. 1394, 1397, 22 L.Ed. 2d 676, 680-81 (1969); see also Terry v. Ohio, 392 U.S. 1, 19, 88 S.Ct. 1868, 1879, 20 L.Ed. 2d 889, 904 (1968); United States v. Place, 51 U.S.L.W. 4844, 4847 (U.S. June 21, 1983). Further, the purpose of investigatory detentions is similar to that of conventional searches and seizures. They are undertaken to advance the

investigation of criminal cases. Additionally, judicial supervision of the criminal process in the investigatory stages of a prosecution, just as in the accusatory phases, permits a salutary review of police actions and protects the constitutional rights of citizens who are suspects in criminal investigations or otherwise embroiled in the criminal process. See generally United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed. 2d 1149 (1967); compare Kirby v. Illinois, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed. 2d 411 (1972). These considerations lead us to consider and treat such investigatory detentions as searches or seizures within the scope of the Fourth Amendment and the State Constitution. Regarded as a search or seizure, investidetentions are properly within the juris-

diction of the judiciary to ensure they are reasonable.

In sum, we hold that the Superior Court has jurisdiction to authorize investigative detentions. This power to authorize investigative detentions is properly founded upon the judiciary's constitutional authority governing search and seizures, N.J. Const. (1947), Art. I, par. 7 and U.S. Const., Amend. IV.[4]

4

Although this constitutional basis for jurisdiction is different from the constitutional basis relied upon by the Appellate Division below, it does not conflict with the Appellate Division determination. The Appellate Division relied on N.J. Const. (1947) Art. VI § III, pars. 2 and 3. This analysis recognizes that once jurisdiction is established to authorize a pre-arrest or pre-charge lineup, such jurisdiction rests with the Superior court. Both views are consistent with other decisions that recognize that a court's jurisdiction over the administration of criminal justice is pervasive. E.g., State v. Williams, 93 N.J. 39 (1983); State v. Leonardis, 73 N.J. 360 (1977); State v. Leonardis, 71 N.J. 85 (1976); see State v. Goodman, 92 N.J. 43 (1983); State v. Robinson, 148 N.J. Super. 278 (App. Div. 1977).

When this jurisdiction is invoked, it triggers the judicial responsibility to assess the need advanced by law enforcement for such procedures and to protect the rights of individuals to be free from unreasonable searches and seizures.

III

We next consider whether the constitutional rights of individuals against unreasonable searches and seizures are adequately protected by investigatory detentions that are judicailly authorized upon less than probable cause and whether certain procedures must be followed in conducting such detentions. In its opinion below, the Appellate Division observed that a court-compelled lineup constituted a less severe intrusion upon privacy interests than a conventional search

or seizure and that such a personal lineup could be authorized where "'the State has established a well-founded suspicion of sufficient weight to justify compelling (a criminal suspect) to submit to an in-person line-up.'" State v. Hall, supra, 183 N.J. Super. at 231 (quoting from trial court decision granting state's motion to compel lineup). Other decisions in this jurisdiction have similarly approved comparable investigatory detentions on less than probable cause. See In re Fingerprinting of M.B., supra (fingerprinting); see also State v. Bradshaw, 170 N.J. Super. 527 (App. Div.), certif. den., 82 N.J. 276 (1979) (lineup); State v. Foy, supra (lineup).

Our consideration of the requisite standards to be applied in this area focuses on the Supreme Court's decision

in Davis v. Mississippi, supra. There the Supreme Court considered whether fingerprints taken from a defendant in the course of an investigatory detention conducted on less than probable cause were admissible in eviden-e. It observed that ". . . because of the unique nature of the fingerprinting process, such detentions might, under narrowly defined circumstances, be found to comply with the Fourth Amendment even though there is no probable cause in the traditional sense." 394 U.S. at 727, 89 S.Ct. at 1397098, 22 L.Ed. 2d at 681 (citation omitted). The Court went on to describe the salient features of an investigatory detention for the purpose of fingerprinting.

> Detention for fingerprinting may constitute a much less serious intrusion upon personal security than other types of police searches and detentions. Fin-

> gerprinting involves none of the probing into an individual's private life and thoughts that marks an interrogation or search. Nor can fingerprint detention be employed repeatedly to harass any individual, since the police need only one set of each person's prints. Furthermore, fingerprinting is an inherently more reliable and effective crime-solving tool than eyewitness identifications or confessions and is not subject to such abuses as the improper line-up and the "third degree." Finally, because there is no danger of destruction of fingerprints, the limited detention need not come unexpectedly or at an inconvenient time. For this same reason, the general requirement that the authorization of a judicial officer be obtained in advance of detention would seem not to admit of any exception in the fingerprinting context.
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> (Id. at 727-28, 89 S.Ct. at 1398, 22 L.Ed. 2d at 681)[5]

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5 The Supreme Court in Davis did not actually decide whether "procedures for obtaining, during the course of a criminal investiga-

Our reading of Davis convinces us that for certain detentions -- those that do not entail significant intrusions upon individual privacy or freedom, are productive of reliable evidence, and can be effectuated without abuse, coercion or intimidation -- "no probable cause in the traditional sense" is necessary in order to obtain the "authorization of a judicial officer(.)" We conclude that, under a "narrowly defined" set of circumstances, such detentions can be constitutionally permissible. Davis, 39 U.S. at 727-28, 89 S.Ct. at 1398, 22 L.Ed. 2d at 681. Strictly limiting the circumstances under which such detentions take place insures that the restrictions upon in-

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5 (cont'd)
tion, fingerprints of individuals for whom there is no probable cause to arrest" could pass muster under the Fourth Amendment.

dividual privacy and freedom interests are minimized so that a showing of need upon less than traditional probable cause can be tolerated. See United States v. Place, supra, 51 U.S.L.W. at 4846 (minimally intrusive detention can be supported on less than probable cause); Terry v. Ohio, supra, 392 U.S. at 27, 88 S.Ct. at 1883, 29 L.Ed. 2d at 909 (permitting police to conduct "stop and frisk" upon less than probable cause); Michigan v. Long, 51 U.S.L.W. 5231 (U.S. July 6, 1983) (permitting police to conduct protective search for weapons in passenger compartment of car upon less than probable cause); cf. Camara v. Municipal Court, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed. 2d 930 (1967) (permitting search upon probable cause determined by administrative standards).

We accordingly conclude that an evidential finding of probable cause to believe that a particular individual has committed a crime is not an absolute prerequisite for judicial authorization of an investigatory detention. We are satisfied that a court has jurisdiction to authorize an investigatory detention under the following limited circumstances. The court's authorization of an investigatory detention must, first, be based upon sufficient evidence to demonstrate that a particular crime has occurred, that the crime is unsolved and that it is under active investigation. Second, the police must demonstrate a reasonable and well-grounded basis to believe that the individual sought as the subject of the investigative detention may have committed the crime under investigation. Addition-

ally, it must be shown that the results of the detention will significantly advance the criminal investigation and will serve to determine whether or not the suspect probably committed the crime. Further, it must also appear that these investigative results cannot otherwise practicably be obtained.[6]

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[6] These standards, in some ways, parallel those adopted in the American Law Institute's Model Code of Pre-Arraignment Procedure Art. 170, Order to Appear for Identification Procedures (1975). With respect to "identification procedures," Section 170.2(6) provides:

> Basis for Issuance.
> The authorized official shall issue a nontestimonial identification order only if he finds that the application meets the requirements of this Section and that, on the basis of the proceedings before him;
>
> > (a) there is reasonable cause to believe an offense specifically described in the application has been committed;
> >
> > (b) there are reasonable grounds to suspect that the person named or de-

In addition to these evidential standards that serve to limit the circumstances under which investigatory detentions may be judicially authorized without probable cause, we recognize that appropriate procedures must be fashioned to assure that the intrusiveness of the detention is properly circumscribed. Investigatory detentions can involve dif-

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6 (cont'd)

> scribed in the affidavit may have committed the offense and it is reasonable in view of the seriousness of the offense to subject him to the specific identification procedures set forth in the application.
>
> (c) the results of the specific identification procedures will be of material aid in determination whether the person named in the affidavit committed the offense; and,
>
> (d) such evidence cannot practicably be obtained by the investigating officer from law enforcement agency or other public official or agency.

ferent kinds of evidence-gathering procedures with differing degrees of intrusiveness. The Supreme Court in Davis emphasized that a detention to permit fingerprinting constituted a limited intrusion into a person's liberty and privacy because fingerprinting did not "prob(e) into an individual's private life and thoughts." A detention for fingerprinting was also regarded as essentially a reliable, simple and expeditious proceeding that could be conducted fairly and without palpable abuse. Davis, supra, 394 U.S. at 727, 89 S.Ct. at 1398, 22 L.Ed. 2d at 681. Accordingly, we conclude that those identification procedures that are comparable to fingerprinting will be sustainable upon a showing of less than traditional probable cause.[7]

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[7] We believe that certain types of proce-

In this case, we think that a lineup for the purpose of securing an identification of the criminal suspect can be conducted in conformity with such standards and likened to the fingerprint-

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7 (cont'd)
dures constitute intrusions that are significantly different from the fingerprinting process, see United States v. Dionisio, 410 U.S. 1, 14-15, 93 S.Ct. 764, 771-72, 35 L.Ed. 2d 67, 79-80 (1973) (distinguishing blood samples from voice or handwriting exemplars and fingerprinting), and would not satisfy the rationale in Davis. The range of such procedures that can be conducted during an investigatory detention is offered by ALI, Model Code of Pre-Arraignment Procedures § 170.12(2), which provides:

> Definition of "Identification Procedures." As used in this Article "identification procedures" shall mean
>
> (a) procedures to obtain identification by fingerprints, palm prints, footprints, body measurements, dental impressions, or other reasonable body surface examinations;
>
> (b) procedures to obtain specimens or samples of blood, urine, saliva, hair or fingernails, or other bodily substances that can be obtained

ing process. The lineup involves no creative or unusual act on the part of the suspect; it involves only a display of evidence that is otherwise publicly visible. See Katz v. United States, 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed. 2d 576, 582 (1967). In this regard the lineup does not "prob(e) into an individual's private life and thoughts." Davis, supra, 394 U.S. at 727, 89 S.Ct. at 1398, 22 L.Ed. 2d at 681. Furthermore, the lineup, when properly conducted, can protect against abuse and insure fairness.

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7 (cont'd)
by comparable methods;

(c) procedures to obtain identification material that may be on the surface of the body or under fingernails or that can be obtained by comparable methods; and

(d) procedures to obtain witness identification through lineups, photographs, voice samples or handwriting exemplars.

See United States v. Wade, supra. When conducted properly and fairly the procedure can furnish reliable evidence and can often be an effective crime-solving tool. Id.; see also State in the Interest of W.C., 85 N.J. 218 (1981). Finally, the lineup procedure can be accomplished at a convenient time and need not entail a restrainst upon the suspect for an unduly long period of time.

In order to safeguard constitutional interests and secure the overall reasonableness of such nontestimonial identification procedures, the conduct of investigatory detentions must be carefully circumscribed by other procedural protections. Davis v. Mississippi, supra, 394 U.S. at 728, 89 S.Ct. at 1398, 22 L.Ed. 2d at 681. (implying that require-

ments of the Fourth Amendment could be met by narrowly circumscribed procedures); see also State v. Valencia, 93 N.J. 126 (1983) (in addition to evidential showing, telephone authorized search must meet certain minimum procedural safeguards). Indeed, the Supreme Court in Davis observed that "abuses" can occur in an investigatory detention, mentioning specifically an "improper line-up." Davis v. Mississippi, supra, 394 U.S. at 727, 89 S.Ct. at 1398, 22 L.Ed. 2d at 681. As a result, in order to guarantee that the detention and accompanying intrusion is not improper or abusive, it must be accomplished in a fashion designed to produce the least amount of harassment of, interference with, or prejudice to the suspect. See, e.g., N.C. Gen. Stat. § 15A-279 (1978); ALI, Model Code of Pre-Arraign-

ment Procedure §§ 160.2, 170.7 (1975); Proposed F. R. Crim. P. 41.1(i) (1971). Further, inmost cases, the suspect must be given sufficient notice of the proposed detention.[8]

8

We acknowledge that certain exigent circumstances will demand prompt police action. For example, police investigators may be required to act swiftly if they reasonably believe that a suspect will radically alter his appearance or flee. In such cases, effective law enforcement will be thwarted by requiring judicial authorization for a detention order, granting the suspect the opportunity to contest a motion for a judicially authorized order and providing notice to the suspect and an opportunity to arrange a convenient time for the detention. Therefore, in such circumstances, prior judicial authorization need not be an absolute requirement. We caution, however, that upon any subsequent motion by the suspect to suppress the results of such a detention, the State bears the heavy burden of proving that the exigent circumstances duly justified dispensing with the required procedures and that the detention satisfied the federal and State constitutional guarantees against unreasonable searches and seizures. See, e.g., United States v. Place, 51 U.S.L.W. 4844 (U.S. June 21, 1983).

See, e.g., N.C. Gen. Stat. § 15A-274. The suspect should also be given the opportunity to arrange a convenient time for the detention, In re Fingerprinting of M.B., supra; see, e.g., N.C. Gen. Stat. §§ 15A-275; ALI, Model Code of Pre-Arraignment § 170.4; Proposed F. R. Crim. P. 41.1(e), and the opportunity to have counsel present during the detention. See, e.g., N.C. Gen. Stat. § 15A-279(d); Idaho Code § 19-625(2)(H) (1979). In addition, unusual or untoward consequences to the suspect resulting from the detention should be avoided or minimized.[9]

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[9] For example, all investigative results could, if appropriate, be destroyed on request of the suspect if, within a reasonable amount of time, there remains no probable cause to link him to the offense being investigated. See, e.g., N.C. Gen. State. § 15A-280; ALI, Model Code of Pre-Arraignment Procedure § 170.8(4); Proposed F. R. Crim. P. 41.1(j).

We think that these procedural safeguards protect citizens' constitutional rights. We are also satisfied that the evidential standard that we adopt, ante at , (slip op. at 13-14), allows police to investigate serious offenses without unduly interfering with the liberty or privacy of a person who has not been charged with any crime. In our view, these procedural requirements, in conjunction with the evidential standard, represent a proper balancing of the public interest in effective law enforcement and the liberty and privacy interests of the individual under the federal and State constitutions.

IV

Applying these judicially formulated guidelines to this case, we believe

that the circumstance- surrounding defendant's detention and lineup clearly and adequately satisfied his constitutional right to be free from unreasonable searches and seizures. Defendant was linked to the commission of serious offenses for which he was ultimately convicted. According to the affidavit in support of the motion to compel the lineup, defendant was identified by an informant as the robber depicted in the composite sketch that was prepared by the police with the assistance of the victims of the crime. Also, one eyewitness of the crime had already made an equivocal identification of defendant's photograph. Based on this substantial information, the prosecutor moved for a detention order. Defendant, accompanied by counsel, was permitted to contest the motion. The

trial judge found that Detective Booket's affidavit established an articulable, well-founded belief that defendant was involved in the commission of the particular offenses. Thus, upon notice to the defendant and with provisions for him to be heard, the detention order was authorized by a neutral and detached judge.

Further, in this case, the degree of intrusion into the individual's interests was certainly reasonable when measured against the degree of proof presented and the government interest involved. The detention was brief. It was conducted upon ample notice and at a convenient time. Defendant was not required to perform any creative act or give evidence not otherwise readily visible. Significantly, no interrogation occurred. Unquestionably, defendant's line-

up detention, safeguarded by adequate restrictions, was beyond legal reproach.

V

The subject of investigative detention is one that merits comprehensive consideration. This subject matter, like telephonically authorized searches, which we recently considered, see State v. Valencia, supra, is more appropriately treated through the exercise of the Court's rule-making power or by legislative action. The subject of investigative detentions has received considerable attention from commentators and in several other jurisdictions that have enacted thorough and detailed schemes regulating pre-charge and pre-arrest investigative detention.[10] The myriad of factors that

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[10] For legislative treatment, see, for

can affect the constitutionality of an investigative detention, including the evidential standards that may justify a detention, the degrees and types of intru-

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10 (cont'd)
example, Ariz. Rev. Stat. § 13-3905 (1978); Idaho Code § 19-625 (1979); N.C. Gen. Stat. § 15A-271 et seq. (1978 & Supp. 1982); Del. Stat. Ann. tit. XI, § 1901 et seq. (1979). S. 2997, proposing 18 U.S.C. § 3507, was introduced in the Senate in 1969, see 115 Cong. Rec. 28896, but remains unadopted as does Proposed Rule 41.1 of the Federal Rules of Criminal Procedure, see 52, F.R.D. 409, 462-67 (1971). See also American Law Institute, Model Code For Pre-Arraignment Procedures, Art. 170 (1975). Numerous commentators have made observations on the topic. See, for example, Note, "Temporary Detention For Lineup Identification With Less Than Probable Cause Permissible Under The Fourth Amendment," 18 Wayne L. Rev. 827 (1972); Comment, "Detention for Taking Physical Evidence Without Probable Cause," 14 Ariz. L. Rev. 132 (1972); Note, "Detention To Obtain Physical Evidence Without Probable Cause: Proposed Rule 41.1 Of The Federal Rules of Criminal Procedure," 72 Colum. L. Rev. 712 (1972); Comment, "Nontestimonial Identification Orders Without Probable Cause," 12 Wake Forest L. Rev. 387 (1976); Steele, "A Proposal To Legitimate Arrest For Investigation," 27 Sw. L.J. 415 (1973).

sions, and the procedures that must accompany a detention, persuade us to refer this matter to a rule-making committee for careful study. The public interest in effective law enforcement and in the containment of criminal activity argues in favor of such investigative detentions provided that safeguards are fashioned to protect basic constitutional rights. We therefore direct the Criminal Practice Committee of the Supreme Court to consider the subject of investigative detentions. The practices of other jurisdictions and literature on the topic provide a starting point for the consideration and formulation of appropriate rules and guidelines governing such detentions.

VI

In conclusion, we hold that there is jurisdictional authority that empowers the Superior Court to issue process to compel a suspect to submit to an investigative detention. This power derives from the court's constitutional power to protect citizens from unreasonable searches and seizures. Orders authorizing an investigative detention may be issued upon less than probable cause according to the evidential standards that we have imposed. Further, the types of nontestimonial identification procedures conducted pursuant to such detentions will be limited and must conform to the procedures that we have specified. These standards and procedures are designed to meet the requirements of the Fourth Amendment and the com-

parable State constitutional provision by minimizing the intrusions upon individual privacy and liberty interests occasioned by such investigative detentions.

Although the complexity of the subject matter prompts us to direct the Criminal Practice Committee of the Supreme Court to study the issue of investigative detentions and recommend rules to be implemented in this jurisdiction, the standards and procedures utilized in the instant case fully comported with the federal and New Jersey constitutions and conformed to the guidelines prescribed herein. Accordingly the judgment of the Appellate Division is affirmed.

Chief Justice Wilentz and Justices Clifford, Schreiber, Pollock, O'Hern and Garibaldi join in this opinion.